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No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation and then introduced that same testimony against the defendant at trial.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 1a-20a) is reported at 547 F.3d 922. The district court's opinion (Pet. App. 21a-155a) is reported at 475 F. Supp. 2d 862.

JURISDICTION

The Eighth Circuit entered judgment on November 21, 2008. The petition for a writ of certiorari was filed on February 18, 2009, and was granted on April 20, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall make or enforce any law which shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

The plaintiffs in this case, Terry J. Harrington and Curtis W. McGhee Jr. ("respondents"), were tried and convicted in 1978 for the murder of an auto dealership security guard in Council Bluffs, Iowa. The Iowa Supreme Court vacated Harrington's conviction in 2003, based on a finding that petitioners had failed to disclose exculpatory evidence of an alternative suspect. *Harrington* v. *State*, 659 N.W.2d 509 (Iowa 2003). Following that decision, McGhee, whose conviction was based on essentially the same facts and evidence, entered an *Alford* plea to second-degree murder in exchange for a sentence of time served. Harrington was not retried.

In 2005, respondents sued petitioners in the United States District Court for the Southern District of Iowa under 42 U.S.C. § 1983, alleging *inter alia* that former county attorneys Joseph Hrvol and David Richter had coerced false testimony from third-party witnesses, then introduced that same testimony at respondents' trials. Respondents also alleged that petitioners had withheld exculpatory evidence of an alternative suspect.[1]

Petitioners moved for summary judgment based on absolute immunity, qualified immunity, and other defenses. In an opinion and order issued February 23, 2007, the district court dismissed claims against petitioners that were based on withholding of exculpatory evidence. Petitioners were absolutely immune

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[1] For purposes of this immunity argument, respondents' allegations are assumed to be true. If this matter were to go to trial, petitioners would vigorously dispute respondents' allegations.

from those claims, the district court held, because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial process." Pet. App. 85a (citing *Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.34 (1976)). The alleged withholding of exculpatory evidence is not at issue in this proceeding.

The district court denied immunity, however, to the extent that respondents' claims arose from allegations that petitioners had coerced false testimony from witnesses that was later introduced at trial and resulted in respondents' convictions. The court held that such allegations were "sufficient to state a substantive due process claim." Pet. App. 104a. Petitioners' pre-trial acts, the district court said, "could be viewed as causatively violating [respondents'] rights to a fair trial." *Id.* at 83a.

In holding that petitioners could be subjected to a § 1983 suit for procurement and use of false testimony, the district court expressly rejected contrary authority from the Seventh Circuit. Pet. App. 104a. In *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) (Easterbrook, J.), cert. denied, 513 U.S. 1085 (1995), the Seventh Circuit held that a prosecutor's procurement of false testimony, without more, does not violate any of a criminal defendant's constitutional rights.[2] Further, the Seventh Circuit explained, the *use* of such testimony in judicial pro-

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[2] To avoid confusion with an earlier decision by this Court in the same case, *Buckley* v. *Fitzsimmons*, 509 U.S. 259 (1993), which is discussed elsewhere in this brief, petitioners will refer to the Seventh Circuit decision as "*Buckley II*."

ceedings would be shielded by absolute immunity. *Ibid.*

In this case, the district court rejected the Seventh Circuit's analysis as "unpersuasive," Pet. App. 104a, instead relying on the dissent in *Buckley II*. The district court opined that a prosecutor "should not be immune from § 1983 liability" for procuring false testimony, because such conduct "'ripen[s] into a § 1983 cause of action * * * by use of the perjured testimony at trial.'" *Id.* at 107a (quoting *Buckley II*, 20 F.3d at 800 (Fairchild, J., dissenting)). The district court denied petitioners' arguments that procurement of false evidence does not, in itself, violate any clearly established constitutional right, and that absolute immunity shields the later use of that evidence in trial. As a result, the court allowed respondents to seek to hold petitioners liable under § 1983 for the consequences of the use of the testimony at trial, namely, respondents' convictions and incarcerations.

Petitioners appealed to the Eighth Circuit under the collateral order doctrine. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). In accordance with the Seventh Circuit's decision in *Buckley II*, they argued that only the use of false testimony, not its mere procurement, could have violated Harrington and McGhee's constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. Pet. App. 17a-18a.

The Eighth Circuit rejected this argument. Pet. App. 18a-19a. With only brief discussion, it affirmed the district court's analysis, holding that a prosecutor's procurement of false testimony "violates a [criminal defendant's] substantive due process rights." *Id.* at 19a. The Eighth Circuit acknowledged

that petitioners "have absolute immunity for their use of [perjured testimony] at trial." Pet. App. 18a. But it held that a prosecutor has *no* immunity "where the prosecutor was accused of *both* fabricating evidence *and then using the fabricated evidence at trial*," resulting in a post-trial "deprivation of liberty." Pet. App. 18a (citing *Zahrey* v. *Coffey*, 221 F.3d 342, 349 (2d Cir. 2000)) (emphasis added).

Thus, in ostensibly denying *qualified* immunity for *procurement* of false testimony, the courts below went further and abrogated *absolute* immunity for the *use* of that testimony *at trial*, thereby making petitioners potentially liable for conviction and incarceration.

SUMMARY OF THE ARGUMENT

I.

Petitioners are absolutely immune from claims that they introduced perjured testimony at respondents' trials. Such claims go to the heart of a prosecutor's function as an advocate for the state in judicial proceedings. The courts below should not have abrogated petitioners' absolute immunity where the alleged constitutional injury was a conviction in violation of due process. Because the claims in this case arise solely from the effect of perjured testimony used at trial, respondents have failed to state a cause of action that may proceed under § 1983.

II.

Instead of analyzing the relevant fair trial claims in this case, the courts below focused on pre-trial conduct, namely the alleged coaching or coercion of witnesses who would testify at trial. This error led to three incorrect conclusions. First, the courts below found that the challenged pre-trial conduct is enti-

tled only to qualified immunity, when in fact it is entitled to absolute immunity because it was directly connected with the trial and respondents' injuries at trial. Second, the courts below postulated a substantive due process right against procurement of perjured testimony, a right never recognized by this Court. Finally, the courts applied a proximate cause analysis, under which petitioners' conduct *before* trial prospectively vitiated their absolute immunity *at* trial, which is inconsistent with this Court's § 1983 decisions. All of these rulings conflict with this Court's decisions and the policy underlying the absolute immunity doctrine. Liability against a prosecutor for the outcome of a trial—here, a conviction in violation of due process—may not be predicated on conduct before trial.

III.

In side-stepping the proper analysis of respondents' trial claims, the courts below treated this case as if it were about malicious prosecution. It is not. Petitioners were absolutely immune for their decision to initiate the prosecution as well as for their conduct at trial. Moreover, they are immune for any acts in connection with respondents' arrests.

ARGUMENT

In *Imbler* v. *Pachtman*, this Court's foundational case on prosecutorial immunity, Paul Imbler alleged that a prosecutor had framed him by engaging in a broad "conspiracy" with police officers "unlawfully to charge and convict him." 424 U.S. at 416. Focusing on the relevant constitutional injury, this Court identified as the "gravamen" of Imbler's claim that the prosecutor had knowingly presented false testimony, thus depriving Imbler of a fair trial. *Ibid.*

Looking to the common law as well as "considerations of public policy," the Court held that a prosecutor must be immune from such a claim. 424 U.S. at 421-429. A prosecutor must carry out his work "with courage and independence," and have "wide discretion in the conduct of the trial and the presentation of evidence." *Id.* at 423, 426. The threat of liability could shade his professional decisions, and the constant threat of civil suits would divert time and energy. "Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425. Just as troubling, such suits "would require a virtual retrial of the criminal offense in a new forum." *Ibid.*

Imbler recognized that a prosecutor may have only qualified immunity for "certain investigative activities." *Id.* at 430. Accordingly, in subsequent decisions, this Court developed a "functional approach" to immunity. See *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993). Under this function test, a prosecutor is absolutely immune for acts that are "intimately associated with the judicial phase of the criminal process." *Id.* at 270. The *Buckley* court reaffirmed "the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Id.* at 273.

In this case, respondents advance the same claim this Court rejected in *Imbler*. They allege that petitioners "conspired" to "frame" them for murder. Harrington Opp. 10; McGhee Opp. 1. In the end, how-

ever, what respondents seek under § 1983 are damages based on their convictions and incarcerations.

Respondents recognize that *Imbler* bars any claim for use of perjured testimony at trial. They also recognize that perjuring witnesses themselves cannot be sued, because their testimony is absolutely immunized. See *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). Respondents therefore asked the lower courts to direct their attention away from trial, where the convictions occurred, and focus instead on the investigation where petitioners allegedly conspired to frame them.

The courts below did so. All but ignoring *Imbler*, and misconstruing *Buckley*, they looked past the relevant constitutional injury at trial and purported to find an injury arising from petitioners' conduct before the trial. A prosecutor's procurement of false testimony, they said, was a "substantive due process" violation. Compounding this error, they reasoned that when a prosecutor procures false testimony, his immunity for use of that same evidence at trial is of no benefit. Neither qualified nor absolute immunity applies, the Eight Circuit held, "where the prosecutor [is] accused of both fabricating evidence and then using the fabricated evidence at trial." Pet. App. 18a. That analysis finds no support in this Court's immunity or § 1983 jurisprudence.

If respondents were wrongfully convicted, they were deprived of their due process right to a trial that was untainted by perjured testimony. But petitioners had absolute immunity for their actions at trial, including the use of perjured testimony. Moreover, where respondents allege that petitioners' pretrial acts were directly connected to injuries that oc-

curred at trial, those pre-trial acts necessarily were immunized as well.

Thus, respondents have failed to state a cause of action that may proceed under § 1983. If a prosecutor's absolute immunity at trial means anything, it is that a prosecutor may not be subjected to a damages suit when those proceedings end in a conviction.

I. PETITIONERS ARE ABSOLUTELY IMMUNE FROM ANY CLAIM ARISING FROM RESPONDENTS' TRIALS.

The courts below erroneously abrogated immunity because they failed to apprehend the relevant constitutional injury for which respondents have sued: their convictions at trial. A prosecutor is absolutely immune from such a claim because it goes to the heart of his function as an advocate for the state in judicial proceedings.

A. Where False Testimony Results In A Conviction, Any Constitutional Claim Arises From The Due Process Right To A Fair Trial.

If a conviction results from perjured testimony at trial, the defendant has been denied the due process right to a fair trial. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959) ("a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment"). But it is the *use at trial* of the perjured testimony, not any antecedent act, that imposes the constitutional injury.

As this Court's cases make clear, the proscription against perjured testimony is a trial right. See, *e.g.*, *Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) ("allegations that [a criminal defendant's] imprisonment resulted

from perjured testimony, knowingly used by the State authorities to obtain his conviction * * * sufficiently charge a deprivation of rights guaranteed by the Federal Constitution"); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935) ("a trial" may not be a "pretense" to deprive a defendant of liberty "by the presentation of testimony known to be perjured"). The right established by "*Mooney* and its progeny" is "a constitutional obligation of the prosecution * * * not to deceive the fact finder or allow it to be deceived by the prosecution witnesses." WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1109-1110 (3d ed. 2000).

Moreover, it is the conviction itself, not simply the use of perjured testimony, that violates due process. A conviction may not be reversed based on a claim of perjured testimony unless the testimony was material to the finding of guilt and its admission was not harmless error. See *Arizona* v. *Fulminante*, 499 U.S. 279, 295 (1991); *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against *conviction* except upon proof beyond a reasonable doubt") (emphasis added); LAFAVE, CRIMINAL PROCEDURE, *supra*, at 1110 (the Court "has refused to go so far as to hold that the knowing failure to correct false testimony produces a due process violation without regard to whether the false testimony was likely to have had an impact upon the outcome of the trial").

This Court's decisions on other constitutional guarantees that protect criminal defendants are consistent. For example, eliciting a false confession does not violate the Fifth Amendment unless the confession was actually introduced at trial. *Chavez* v. *Martinez*, 538 U.S. 760, 767 (2003) (plurality opinion) (the self-incrimination guarantee is a "trial right").

Nor does a suggestive preindictment identification procedure inherently intrude on a constitutionally protected interest. *Manson* v. *Brathwaite*, 432 U.S. 98, 113 n.13 (1977). Rather, a violation occurs when "a fair trial [i]s impaired by the admission of testimony regarding the unreliable identification." *Wray* v. *City of New York*, 490 F.3d 189, 193 (2d Cir. 2007); see also *Rakas* v. *Illinois*, 439 U.S. 128, 134 (1978) (where police obtain evidence by searching a third party's property, the defendant's own Fourth Amendment rights are not violated; he "is aggrieved * * * *only through the introduction* of [the] damaging evidence") (emphasis added).

Even with regard to prophylactic requirements such as *Miranda* warnings, most courts have rejected § 1983 damage claims based on police failure to give the warnings, because a "violation occurs only when self-incriminating statements are introduced at trial, thereby compelling the defendant to 'become a witness against himself.'" *Riley* v. *Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997) (en banc); see also Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 487 n.182 (2002) (collecting cases).

B. *Imbler* Bars Any Claim For Respondents' Trial Injuries.

1. Assuming that respondents were wrongfully convicted, they were denied the due process right to a fair trial. The alleged use of perjured testimony by petitioners is the "gravamen" of their claims. *Imbler*, 424 U.S. at 416.

But an allegation that a prosecutor "knowingly used false testimony" is precisely the claim that *Imbler* bars. 424 U.S. at 413. "Prosecutors are entitled

to absolute immunity for actions as advocates * * * at trial even if they present unreliable or wholly fictitious proofs." *Buckley II*, 20 F.3d at 795 (citing *Buckley*, 509 U.S. 259 n.3, and *Burns* v. *Reed*, 500 U.S. 478, 489-490 & n.6 (1991)). Where an injury occurs as part of the judicial process, the rule of immunity is "categorical[]." *Kalina* v. *Fletcher*, 522 U.S. 118, 126 (1997). Respondents' claims necessarily fail because they fall squarely within the heartland of absolute immunity.

These claims may not be recharacterized as anything but what they are: trial violations. A due process claim based on a conviction cannot be predicated on a wrongful investigation, because there is no due process right not to be accused of a crime based on unreliable evidence. *Albright* v. *Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion) (rejecting a "claim to be free from prosecution except on the basis of probable cause"); *id.* at 283 (Kennedy, J., concurring in the judgment) ("the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution"). Even those Justices who have suggested such an extension of due process have never intimated that it would abrogate *Imbler* and allow a § 1983 plaintiff to sue a prosecutor for malicious prosecution. See *id.* at 291-316 (Stevens, J., dissenting).

As this Court has explained, the Due Process Clause may not be twisted "into a rule of virtually unqualified liability" for wrongful government conduct. "Such an approach * * * would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties.'" *Anderson* v. *Creighton*, 483 U.S. 635, 639

(1987) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984)). Because § 1983 is not a "font of tort law," *Paul* v. *Davis*, 424 U.S. 693, 701 (1976), this Court's jurisprudence has "tailor[ed] liability to fit the interests protected by the particular constitutional right in question." *Townes* v. *City of New York*, 176 F.3d 138, 148 (2d Cir. 1999) (citing *Carey* v. *Piphus*, 435 U.S. 247, 258-259 (1978)).

Focusing on the relevant constitutional injury preserves the principle that in a § 1983 suit, "compensation for violations of constitutional rights should encompass only constitutionally relevant injuries—that is, injuries within the risks that the constitutional prohibition seeks to avoid." John C. Jeffries Jr., *Damages for Constitutional Violations: the Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461 (1989). The risk that the due process guarantee seeks to avoid is not wrongful investigation or wrongful accusation, but only wrongful conviction.

2. This understanding is consistent with this Court's teaching in *Buckley* that in evaluating "whether a complaint has adequately alleged a cause of action for damages" that is not barred by immunity, it is the "location of the injury" that is "relevant." 509 U.S. at 271-272.

In *Buckley*, the petitioner alleged that prosecutors had "violated his constitutional rights in presenting * * * fabricated evidence to * * * his trial jury," 509 U.S. at 267 n.3—the same injury that respondents allege in this case. The lower courts held that those actions were protected by absolute immunity. This Court observed that those holdings were "made according to traditional principles of absolute

immunity under § 1983," *ibid.*, and were "undisturbed by this opinion," *id.* at 279.

Writing for four Justices, Justice Kennedy took pains to underscore this point—indeed, he anticipated exactly the scenario here: that a court would deny immunity based on its failure to apprehend the constitutional injury that was relevant to the plaintiff's claim for damages. He observed that "it appears that the only constitutional violations" caused by the fabricated evidence in *Buckley* "occurred within the judicial process," and thus could not state a cause of action against a prosecutor under § 1983. 509 U.S. at 285 (Kennedy, J., concurring in part and dissenting in part).

Justice Scalia, who provided the fifth vote for the majority, amplified this point. Buckley's false-evidence claims likely could not form any cause of action under § 1983, he explained, because there is "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." 509 U.S. at 281 (Scalia, J., concurring). And for the prosecutors' "knowing *use* of fabricated evidence before the grand jury and at trial—acts which might state a [fair-trial] claim for denial of due process, see, *e.g.*, [*Mooney*]—the traditional defamation immunity provides *complete protection* from suit under § 1983." *Ibid.* (emphasis added).

3. The district court here observed that "[i]f [police] officers use false evidence" at trial, "including false testimony, to secure a conviction, the defendant's due process is violated." Pet. App. 105a (quoting *Wilson* v. *Lawrence County*, 260 F.3d 946, 954 (8th Cir. 2001) (citing *Napue* and *Mooney*)). But that

observation was irrelevant because police and prosecutors play fundamentally different roles at trial.

These different roles at trial require different immunities. Police officers have qualified immunity because, unlike prosecutors, they are not advocates in judicial proceedings and are not authorized to introduce evidence; their work is "further removed from the judicial phase of criminal proceedings." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986). "Policemen do not have any control over state prosecutors as to the conduct of criminal proceedings." *Smith* v. *Holtz*, 30 F. Supp. 2d 468, 477 (M.D. Pa. 1998), aff'd, 210 F.3d 186 (3d Cir. 2000); see also *Wray*, 490 F.3d at 193 (where "a fair trial [i]s impaired by the admission of [unreliable] testimony * * * the due process focus is principally on the fairness of the trial, rather than on the conduct of the police"). By contrast, giving a prosecutor only qualified immunity at trial would "impair the performance of a central actor in the judicial process." *Malley*, 475 U.S. at 343.

Like any witness, a police officer would have absolute immunity for actual testimony at trial, even if the officer commits perjury. *Briscoe*, 460 U.S. at 342-345. Thus, like a prosecutor serving as the state's advocate, a police officer who introduces false evidence through his own testimony cannot be sued under § 1983. The circuits disagree over whether and under what theory police officers, investigators, or technicians may be held liable for non-testimonial acts that contribute to a wrongful conviction.[3] This

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[3] For example, the Fifth Circuit, looking to *Napue*, considers it a due process violation when a police officer's acts cause a wrongful conviction. *Brown* v. *Miller*, 519 F.3d 231, 237 (5th Cir. 2008). The Seventh Circuit has held that where a police officer's fabrication of evidence causes

Court has not addressed the proper approach in such cases, and the question is not relevant here. At trial, petitioners functioned solely as prosecutors, and if they used perjured testimony to obtain respondents' convictions, those acts are absolutely immunized.

C. Courts Properly Evaluating § 1983 Claims Reject Attempts To Circumvent A Prosecutor's Immunity In Judicial Proceedings.

Courts that have correctly identified a constitutional violation occurring in judicial proceedings have declined to circumvent a prosecutor's absolute immunity from liability for that violation.

For example, in *Gonzalez* v. *City of New York*, 69 F. App'x 7 (2d Cir. 2003), plaintiff Saul Gonzalez claimed he had been wrongfully arrested and held in custody on the basis of mistaken identity. Although fingerprint analyses ordered by the prosecutor indicated that Gonzalez was not the perpetrator, the prosecutor repeatedly argued in court that Gonzalez was being properly detained. The district court held that the prosecutor was absolutely immune for Gonzalez's wrongful detention.

The Second Circuit affirmed. The court explained that Gonzalez's detention was not caused by the prosecutor's "investigation into his identity," but

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wrongful conviction, it is a *Brady* violation. *Manning* v. *Miller*, 355 F.3d 1028, 1034 (7th Cir. 2004). Other courts categorize such claims as malicious prosecution. *E.g.*, *Pierce* v. *Gilchrist*, 359 F.3d 1279 (10th Cir. 2004). Still other decisions have said that such claims against police for the false trial testimony of a witness are simply an inappropriate effort to circumvent the witness' immunity under *Briscoe*. *E.g.*, *Miller* v. *Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991).

rather by the prosecutor's arguments "that the evidence suggested appellant was [the perpetrator], despite the growing number of fingerprint analyses that strongly suggested otherwise." 69 F. App'x at 10. Because the prosecutor "was acting in her quintessential role as an advocate, arguing in court, she is entitled to absolute immunity for her actions and cannot be held liable for appellant's prolonged detention." *Ibid.*

As the Second Circuit earlier explained in *Lee* v. *Willins*, although the plaintiff had alleged falsification of evidence and coercion of perjured testimony by a prosecutor, "the injuries to [the plaintiff] that could result from these acts are * * * the deprivation of his liberty for five years, his subjection to the ordeal of multiple trials, and the emotional and economic injury resulting therefrom. These are precisely the alleged injuries for which *Imbler* granted absolute immunity." 617 F.2d 320, 322 (2d Cir. 1980); accord *Weinstein* v. *Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) ("This court sees no difference * * * between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation").

Similarly, the Ninth Circuit held that when a prosecutor is alleged to have participated in a conspiracy to rig a trial, it is the location of the "ultimate acts" responsible for the conviction, not the "act of conspiring," that is relevant for applying immunity. *Ashelman* v. *Pope*, 793 F.2d 1072, 1077-1078 (9th Cir. 1986) (en banc). "There appears to be no other authority for making the underlying conspiracy

the determinative act in deciding whether immunity should be available." *Id.* at 1077.

The Seventh Circuit came to the same conclusion on remand from this Court's decision in *Buckley*. The relevant facts were virtually identical to the facts in this case. The plaintiff alleged that prosecutors had violated his constitutional rights by coercing false statements from third parties through use of reward money, then using this false testimony in Buckley's indictment and trial. *Buckley II*, 20 F.3d at 794-795.

This Court directed the court of appeals to address Buckley's claim that "prosecutors violated his rights under the Due Process Clause through extraction of statements implicating him by coercing two witnesses and paying them money." 509 U.S. at 279. The Seventh Circuit found that Buckley had not identified "any case holding that this practice violates the Constitution. * * * His contention that the [reward money] payments [to witnesses] themselves violate the due process clause does not state a claim on which relief may be granted." *Buckley II*, 20 F.3d at 794; accord *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

If a prosecutor actually *used* such false testimony in judicial proceedings, absolute immunity would shield him from a damages suit. The Seventh Circuit explained that "if the constitutional entitlement is a right to prevent use of [false evidence] at trial * * * then absolute immunity under *Imbler* defeats Buckley's claim." 20 F.3d at 795 (citing *Buckley*, 509 U.S. at 267 n.3; *Burns*, 500 U.S. at 489-490 & n.6).

The analysis of these courts is sound. "[E]vents not themselves supporting recovery under § 1983 do not become actionable because they lead to injurious

acts for which the defendants possess absolute immunity." *Buckley II*, 20 F.3d at 796. The courts below failed to recognize this principle.

D. This Court Has Consistently Reaffirmed The Rationales For Absolute Immunity.

Application of absolute immunity may "leave[] victims of egregious prosecutorial misconduct without a remedy." *Michaels* v. *McGrath*, 531 U.S. 1118, 1119 (2001) (Thomas, J., dissenting from denial of certiorari). But this Court has repeatedly reaffirmed that this unavoidable consequence of *Imbler* is outweighed by the policies underlying the absolute immunity doctrine.

Imbler candidly acknowledged that a prosecutor's absolute immunity "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." 424 U.S. at 427. Yet this Court has reaffirmed the controlling rationales for absolute immunity—protecting prosecutorial independence, discouraging meritless claims, avoiding relitigation of criminal appeals—even while acknowledging that it represents a "balance" of "evils." *Id.* at 428; *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 859 (2009); accord *Buckley*, 509 U.S. at 270 n.4.

Lower courts may not fashion theories that create loopholes in *Imbler*. For the functions to which it applies, absolute immunity must be a bright-line rule. It must "defeat[] a suit at the outset," rather than depend on "the circumstances and motivations" of the prosecutor's conduct. *Imbler*, 424 U.S. at 419 n.13. Otherwise, it is nothing more than a pleading rule and may be defeated by a plaintiff who is "clever enough to include some actions taken by the prosecu-

tor prior to the initiation of prosecution." *Buckley*, 509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part). Absolute immunity is "*immunity from suit* rather than a mere defense to liability," *Scott* v. *Harris*, 550 U.S. 372, 376 n.2 (2007), and that immunity is lost if a prosecutor is forced to defend actions that *Imbler* intended to place outside the reach of a § 1983 suit.

In summary, respondents' claims arise solely from their trials, because they have alleged that they were wrongfully convicted. Petitioners are absolutely immune from suit for their acts at trial, including the introduction of perjured testimony. Respondents have failed to state a cause of action that may proceed under § 1983.

II. LIABILITY FOR RESPONDENTS' TRIAL INJURIES MAY NOT BE PREDICATED ON PETITIONER'S PRE-TRIAL ACTS.

Rather than assess the relevant fair trial claim in this case, the courts below focused on petitioners' acts *before* trial—specifically, the allegation that petitioners had suborned perjury by coaching or coercing the witnesses who would later testify.

First, the courts found that petitioners had only qualified immunity for these pre-trial acts. Then, they postulated that a prosecutor's procurement of perjured testimony for later use at trial violates a criminal defendant's substantive due process rights. Finally, the courts below compounded these errors by applying a proximate cause analysis that is unrecognized in this Court's § 1983 decisions, under which acts taken *before* trial prospectively vitiate a prosecutor's absolute immunity *at* trial. Each of these rulings conflicts with this Court's jurisprudence.

A. Absolute Immunity Applies To Pre-Trial Acts That Are "Directly Connected" To A Prosecutor's "Conduct Of A Trial."

1. While qualified immunity is the default rule for administrative and investigative acts performed by a prosecutor, absolute immunity applies to pre-trial acts that a plaintiff alleges were directly responsible for a trial injury.

The principle that pre-trial acts do not acquire absolute immunity simply *because* a prosecutor performs them is intended to assure that plaintiffs may recover for a prosecutor's constitutional torts that produce injuries *outside* the judicial process. "Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." *Buckley*, 509 U.S. at 274; see also *Burns*, 500 U.S. at 494 (absolute immunity is reserved for "actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct"); *Taylor* v. *Kavanagh*, 640 F.2d 450, 453 (2d Cir. 1981) (distinguishing between "injuries related solely to the prosecution itself" and "alleged harm [that] is inflicted independently from the prosecution," such as an illegal search). This makes sense, because an illegal search is not a part of judicial proceedings, and the injury to the victim's Fourth Amendment interests is complete when the search occurs.

A prosecutor's absolute immunity in judicial proceedings does not "retroactively" shield investigative or administrative work that has with no connection to the judicial proceedings. *Buckley*, 509 U.S. at 276. But here, the courts below took the reasoning that was rejected in *Buckley* and applied it in the other

direction. They assumed that petitioners had only qualified immunity for pre-trial acts, and then pushed that liability forward to *prospectively* abrogate absolute immunity for use of the evidence at trial. See Pet. App. 17a-18a, 108a. That reasoning is flawed.

2. As discussed in Part I, *supra*, respondents' claim is for a trial injury, and absolute immunity bars that claim. Where a plaintiff claims that a prosecutor committed a pre-trial act with the intent to affect the trial, as respondents allege here, that particular pre-trial act is absolutely immunized as well.

This principle was given effect in a unanimous decision last term, in which the Court recognized that despite the default rule of qualified immunity for a prosecutor's administrative activities, a prosecutor has absolute immunity for those administrative activities that are alleged to have caused a trial violation. *Van de Kamp*, 129 S. Ct. at 862. In *Van de Kamp*, the petitioner alleged that a prosecutor's due process violation in failing to disclose impeachment material was attributable to the failure of supervisory prosecutors to provide training and maintain proper information systems. In holding that the challenged administrative acts were absolutely immune, the Court distinguished them from other administrative duties such as hiring. The administrative activities challenged by the petitioner were absolutely immune because they involved "a *certain kind* of administrative obligation—a kind that itself is *directly connected with the conduct of a trial*." *Van de Kamp*, 129 S. Ct. at 862 (emphasis added).

The same analysis applies here. Despite the presumptive rule of qualified immunity for a prosecutor

who participates in the investigation of a crime, the claims in this case focus on a "certain kind" of investigative act—procurement of false testimony for later use at trial—that "is directly connected with the conduct of a trial." *Van de Kamp*, 129 S. Ct. at 862. As the Court explained, this conduct was "'intimately associated with the judicial phase of the criminal process' *because it concerned the evidence presented at trial*." *Ibid.* (quoting *Buckley*, 509 U.S. at 430) (emphasis added).

Respondents allege that petitioners coerced various witnesses to provide "trial testimony" against respondents. Harrington Compl. ¶ 130. Petitioners allegedly "knew that their whole case against Harrington and McGhee hinged on the coerced and coached statement of" witness Kevin Hughes. *Id.* ¶ 199; accord McGhee Compl. ¶ 165. Petitioners allegedly worked with Hughes on his testimony because they knew of an alternative suspect and were concerned that without such coaching, "a jury might reject [Hughes'] story." McGhee Compl. ¶ 166. Such "an out-of-court 'effort to control the presentation of [a] witness' testimony' [i]s entitled to absolute immunity because it [i]s 'fairly within [the prosecutor's] function as an advocate.'" *Buckley*, 509 U.S. at 272-273 (quoting *Imbler*, 424 U.S. at 430 n.32).

The fact that procuring false testimony might be *improper* trial preparation is irrelevant, since *Imbler* allows a prosecutor to present false testimony at trial without risk of liability. Respondents allege that petitioners' acts were "connected with [their] role in judicial proceedings," *Burns*, 500 U.S. at 494; they tie these allegations directly to the conviction they suffered at trial. Thus, these pre-trial acts are immune.

This Court emphasized in *Buckley* that it "ha[s] not retreated * * * from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." 509 U.S. at 273. It recognized that "'the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.'" *Id.* at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). *Buckley* rejected the argument that absolute immunity "extends only to the act of initiation itself and to conduct occurring in the courtroom. This extreme position is plainly foreclosed by our opinion in *Imbler* itself." *Ibid.*

In the district court's view, petitioners' pre-trial acts "causatively violat[ed] the [respondents'] rights to a fair trial." Pet. App. 83a. If that is true, then it would be inconsistent, result-oriented reasoning to also conclude that these acts were too remote from the trial to be encompassed by absolute immunity. Such logic would open the door for other § 1983 plaintiffs to evade absolute immunity by purporting to attack the preparation rather than the immunized activity itself. Expanding liability in that way also would discourage the responsible and necessary involvement by prosecutors in overseeing investigations, something that is routine for federal as well as local prosecutors.

This understanding is consistent with the functional approach to immunity because "advocacy [does not] have an inherent temporal limitation." *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part).

> It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same but the functions distinct.

Ibid.

In short, if petitioners coerced perjured testimony, those acts are absolutely immune because, based on respondents' own allegations, the acts "concerned the evidence presented at trial." *Van de Kamp*, 129 S. Ct. at 862.

B. There Is No "Substantive Due Process" Claim For A Wrongful Investigation.

1. According to the district court, "Plaintiffs' claims that the prosecutors manufactured, coerced, and fabricated evidence against them is [sic] sufficient to state a substantive due process claim." Pet. App. 103a-104a. The Eighth Circuit agreed, stating that "immunity does not extend to the actions of a [prosecutor] who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not a distinctly prosecutorial function." Pet App. 19a. These holdings were erroneous.

Relocating a constitutional violation from trial to investigation in this way finds no support in this Court's § 1983 jurisprudence. Further, it would gut *Imbler*, or at least reduce absolute immunity to a pleading rule. Such a theory "simply reframe[s the] claim to attack the preparation" for a prosecution

"instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

Given that "the guideposts for responsible decisionmaking" in the "unchartered area" of substantive due process "are scarce and open-ended," *Collins* v. *Harker Heights*, 503 U.S. 115, 125 (1992), lower courts should not expand existing rights using substantive due process simply because they wish to compensate a sympathetic plaintiff. As this Court has recognized, the federal judiciary is not empowered to fashion compensation schemes for wrongful conviction in the absence of a cognizable cause of action under § 1983. *Briscoe*, 460 U.S. at 344 n.30. That responsibility lies with the states.

2. This Court has never suggested that the act of procuring false testimony is a stand-alone constitutional tort. There is no substantive due process claim for malicious prosecution, *Albright*, 510 U.S. at 270 n.4 (plurality opinion), and "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley*, 509 U.S. at 281 (Scalia, J., concurring); see also *Chavez*, 538 U.S. at 776 (plurality opinion) (no substantive due process right against self-incriminating interrogation); *Rakas*, 439 U.S. at 134. Applied to the gathering of evidence in an investigation, substantive due process has no footing in this Court's decisions and certainly involves no right that is "clearly established." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

The district court opined that if petitioners fabricated or coerced witness testimony, this behavior implicated substantive due process because it was

"shocking to the conscience." Pet. App. 104a. But not everything that is said to shock the conscience is a substantive due process violation.

This Court has explained that to shock the judicial conscience, government action must be "arbitrary" and "unrestrained by the established principles of private right and distributive justice." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845 (1998). Thus, if a prosecutor uses perjured testimony at trial to obtain a conviction, such conduct is shocking to the conscience—which is why this Court has recognized for more than half a century that such behavior is proscribed by an "established principle[] of private right": the Fourteenth Amendment due process right to a fair trial. But no matter how troubling it may be if prosecutors suborn perjury during an investigation, a criminal defendant suffers no constitutional deprivation if the false evidence is simply placed in a drawer. Only its use in judicial proceedings causes injury.

3. If respondents were wrongfully convicted, that injury necessarily occurred at trial. But this Court has never described Fourteenth Amendment fair trial rights as implicating *substantive* due process. See *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) ("By requiring the government to follow appropriate *procedures* when its agents decide to deprive any person of life, liberty, or property" as in a trial, "the Due Process Clause promotes fairness in such decisions") (emphasis added); *Castellano* v. *Fragozo*, 352 F.3d 939, 968 (5th Cir. 2003) (Higginbotham, J.) (Supreme Court's decisions make clear that "fabricated evidence and perjured testimony * * * [implicate] procedural, not *substantive*, due process").

Claims that a prosecution was pursued improperly "should be analyzed not under the substantive due process approach * * * but under the language of the Constitution itself." *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). "Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Albright*, 510 U.S. at 273 (plurality opinion); accord *United States* v. *Lanier*, 520 U.S. 259, 272 n.7 (1997). Thus, a claim for arrest without probable cause is a Fourth Amendment, not a substantive due process, claim, *Albright*, 510 U.S. at 273 (plurality opinion), as is a claim for excessive use of force, *Graham v. Connor*, 490 U.S. 386, 397 (1989).

As discussed in Part I, *supra*, because respondents seek damages for their convictions, their claims rest on a violation of the due process right to a fair trial. Such a claim is barred against a prosecutor by absolute immunity. Respondents may not evade this analysis by recharacterizing their injuries as substantive due process violations.

C. Absolute Immunity May Not Be Abrogated On A Theory Of Proximate Cause.

1. Having postulated a constitutional violation before trial, the courts below then used it to abrogate petitioners' trial immunity, relying on the Second Circuit's decision in *Zahrey*. See Pet. App. 18a-19a; 107a-109a. *Zahrey* involved a prosecutor who allegedly fabricated evidence against a New York City police officer for use in criminal and police disciplinary proceedings. The target of the proceedings was in-

dicted and arrested based on the false evidence, but was subsequently acquitted.

Zahrey announced a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." 221 F.3d at 349. The *Zahrey* court created this right out of whole cloth, focusing on the prosecutor's investigation but citing only cases that deal with rights applicable in trial or other judicial proceedings. *Id.* at 355 (citing *Napue*, *Pyle*, and *Mooney*).

Significantly, the deprivation of liberty in *Zahrey* was limited to the period between arrest and trial. Because Zahrey was acquitted, the Second Circuit had no basis to consider whether a prosecutor who procures false evidence could also be held liable for conviction and post-trial incarceration. Yet that is the context in which the Eighth Circuit applied *Zahrey* here.

2. If a prosecutor fabricated evidence during an investigation, the *Zahrey* court said, then "it was at least reasonably foreseeable that in his advocacy role he would later use that evidence before the grand jury, with the likely result that Zahrey would be indicted and arrested." 221 F.3d at 354. In other words, based on an investigative act, a prosecutor could be held liable for injuries that did not occur until a judicial proceeding.

In making the crux of the analysis whether a constitutional violation in judicial proceedings is "reasonably foreseeable" from an investigation, *Zahrey* resorted to proximate-cause reasoning from the common law of torts that this Court has rejected. Unlike the common law of torts, the Fourteenth Amendment is not concerned with "dut[ies]" to avoid

harm or whether breach of such duties may "be said * * * to have proximately caused" later injuries. *Martinez* v. *California*, 444 U.S. 277, 285 (1980). Indeed, the Court cited *Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339 (1928)—the classic "foreseeability" tort case—as an example of the kind of analysis that does not apply in § 1983 cases.

Moreover, applying ordinary tort reasoning to a case like this one is inappropriate because there is no common law tort analogue for denial of due process at trial. See Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 14 (1980); *Imbler*, 424 U.S. at 441 (White, J., concurring in the judgment) (besides malicious prosecution, "[t]here were simply no other causes of action at common law brought against prosecutors for conduct committed in their official capacity"). The purpose of § 1983 is to compensate victims for deprivations of recognized constitutional rights, and this Court's decisions teach that concepts drawn from "common-law traditions must be rejected where they conflict with the goals of the civil rights statute." Whitman, *Constitutional Torts*, at 17.

The *Zahrey* court invoked a statement from *Monroe* v. *Pape* that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 221 F.3d at 349 (quoting 365 U.S. 167, 187 (1961)). But that statement pertains to whether a § 1983 action requires a showing of specific intent. *Monroe*, 365 U.S. at 187. It does not authorize creative theories of tort liability that are unmoored from specific constitutional guarantees. Common law rules "defining the elements of damages and the prerequisites for their recovery" provide only the "start-

ing point for the inquiry under § 1983." *Carey*, 435 U.S. at 257-258. "Although the common law tort serves as an important guidepost for defining the constitutional cause of action, the ultimate question is always whether the plaintiff has alleged a constitutional violation." *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1289 (10th Cir. 2004) (McConnell, J). Applying the common law tort principle of "natural consequences" in this way would fly in the face of this Court's teaching that § 1983 is not a "font of tort law." *Paul*, 424 U.S. at 701. Where the relevant constitutional right applies in judicial proceedings, as with use of perjured testimony, proximate cause reasoning simply circumvents *Imbler*'s rule of absolute immunity.

3. *Zahrey* also cannot be squared with longstanding precedent. An analysis based on "foreseeability" is another way of saying that a prosecutor's investigative acts set the stage for a suspect to be charged and convicted, or at least made conviction at trial more likely. But that argument depends on a form of but-for reasoning that was rejected more than 80 years ago.

This Court has repeatedly cited *Yaselli* v. *Goff*, 12 F.2d 396 (2d Cir. 1926), summarily aff'd, 275 U.S. 503 (1927), for the proposition that a prosecutor cannot be held liable for eliciting false testimony from witnesses. *E.g.*, *Imbler*, 424 U.S. at 422; *Burns*, 500 U.S. at 490. In *Yaselli*, the prosecutor was accused not only of using false evidence, but also of having "conspired to prosecute [the] plaintiff maliciously" and obtaining a government appointment specifically "for the purposes of the prosecution." 12 F.2d at 407. But this did not deprive the prosecutor of immunity for the injurious conduct itself:

> The important fact is that he was appointed to the office, and, having been appointed, the public interests require that he shall be free and fearless to act in the discharge of his official duties. If he cannot be charged with acting willfully and maliciously after he gets appointed to the office, no more can he be charged with having conspired to get into the office in order to act willfully and maliciously after he gets his appointment. * * * We are unable to distinguish between the two cases in principle.

Ibid.

If a prosecutor does not lose immunity for maliciously creating circumstances that allow him to bring a wrongful prosecution in the first place, he certainly cannot lose immunity for helping to create the circumstances that allow him to obtain a conviction in judicial proceedings. If the act at trial is immunized, the preparatory acts cannot abrogate that immunity.

In the end, it is impossible to reconcile *Zahrey* with *Buckley*. *Zahrey* violates the function test by eliding the distinction between a prosecutor's investigative and advocacy roles. If a prosecutor is absolutely immune for conduct in a judicial proceeding, *Imbler*, 424 U.S. at 430-431, then saying it was "reasonably foreseeable" that the prosecutor would introduce false evidence that he had earlier procured "simply reframe[s the] claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

A final reason to reject a proximate cause theory is that it would demote absolute immunity to nothing more than a pleading rule. On a mere allegation of wrongful investigative conduct, a prosecutor would be "made to answer in court each time such a person charged him with wrongdoing," and this "would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Imbler*, 424 U.S. at 425. Such a rule would nullify absolute immunity in judicial proceedings and promote "vexatious litigation that might have an untoward effect on the independence of the prosecutor." *Burns*, 500 U.S. at 492.

In summary, liability against a prosecutor for his conduct at trial cannot be predicated on pre-trial acts. There is no freestanding constitutional right against an improper investigation. Where the actual injury occurs in judicial proceedings, the prosecutor is absolutely immune.

III. RESPONDENTS' TRIAL CLAIMS MAY NOT BE RECHARACTERIZED AS MALICIOUS PROSECUTION CLAIMS.

The question whether § 1983 allows some form of federal claim for "malicious prosecution" is not presented in this case. That issue was not briefed in prior proceedings, and the courts below did not address it. Nonetheless, it is apparent that malicious-prosecution reasoning found its way into the lower courts' analyses, a further reason why the decision below should be reversed.

A. A Prosecutor's Absolute Immunity May Not Be Circumvented Through Malicious Prosecution Reasoning.

1. Judge Fairchild's dissent in *Buckley II*, on which the district court expressly relied, see Pet. App. 106a-107a, is a quintessential example of malicious prosecution reasoning. Judge Fairchild did not dispute the majority's conclusion that "a prosecutor is not liable for the result of his wrongful act * * * where the immediate cause of the impairment is an act as to which the prosecutor is immune." 20 F.3d at 800 (Fairchild, J., dissenting). Instead, he argued that Buckley's constitutional rights had been impaired because "there would not have been either an indictment or trial if some of the prosecutors had not fabricated evidence and suborned perjury." *Ibid.*

If *procuring* false testimony works no cognizable constitutional injury and *using* it at trial is absolutely immunized, then the but-for reasoning in Judge Fairchild's opinion can only mean that a prosecutor wrongfully instituted criminal proceedings. Such an analysis would be flawed and unsupported by controlling precedents.

The courts below opined that "[i]t would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer who enlists himself in a scheme to deprive a person of liberty." Pet. App. 18a. But under the facts alleged in this case, such reasoning is misplaced.

A malicious prosecution claim may lie against a police officer who deceives a prosecutor into filing criminal charges. See, *e.g.*, *Jones* v. *City of Chicago*,

856 F.2d 985, 994 (7th Cir. 1988). The officer's deception subverts the prosecutor's "independent judgment" and is therefore the cause of the prosecution. *Townes*, 176 F.3d at 147. But here, petitioners are not alleged to have defrauded anyone into filing false charges; they did not go from being malicious investigators to "unsuspecting" prosecutors. The cause of the prosecution was the "independent judgment" of petitioners themselves. If there is no deception—that is, if the prosecutor knows there is no probable cause, but proceeds anyway—then the constitutional harm necessarily flows from the prosecutor's immunized acts of "initiating and pursuing a criminal prosecution." *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring). Stretching to find a malicious prosecution theory against a prosecutor in these circumstances would be truly "anomalous." *Ibid.* Justices Stevens and Blackmun would have found a 14th Amendment due process violation against the police officer in *Albright* "who attested to the criminal information" without probable cause, *id.* at 292 (Stevens, J., dissenting), but nowhere suggested that this principle could be applied against a prosecutor in a way that would affect absolute immunity under *Imbler*.

Indeed, attempting to hold a prosecutor liable in damages for such an injury is precisely what *Imbler* forbids. If a prosecutor is immune both for "initiating a prosecution" without probable cause, as well as "presenting the State's case" at trial, *Imbler*, 424 U.S. at 431, then it is truly "perverse" to abrogate absolute immunity from damages for prosecution and conviction on the rationale that the prosecutor conducted a wrongful investigation before he filed the wrongful charges. A prosecutor's decision to pursue an improper prosecution necessarily involves

some premeditation, but the harm flows from the charges themselves, not from the investigation.

2. Under the function test, if a prosecutor serves as an affiant or complaining witness for an arrest or a criminal information, that act receives only qualified immunity. *Kalina,* 522 U.S. at 129-131. But there is no evidence or allegation that petitioners personally vouched for facts or in any other way served as complaining witnesses. The "preliminary informations"—under Iowa law at the time, the complaints that accused Harrington and McGhee of murder and asked that they be "arrested and dealt with according to law"—were sworn out by a police officer and endorsed by a magistrate. See J.A. 54. It is undisputed that neither Richter nor Hrvol personally arrested Harrington or McGhee, and there is no evidence in the record that either signed a complaint or affidavit to support the arrest. Instead, they signed the "True Information," *i.e.*, the formal charging document that followed the arrest. See Petitioners' C.A. App. 245-267.

Under *Kalina*, "[o]nly where the prosecutor acts as a complaining witness in this setting will he or she lose absolute immunity protection." 2 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7:47 (4th ed. 2008); accord *Ireland* v. *Tunis*, 113 F.3d 1435, 1447 (6th Cir. 1997) (absolute immunity gives way to qualified immunity "when a prosecutor or other official switches from presenting the charging document to vouching personally for the truth of the contents of the document"); *cf. Wilkins* v. *DeReyes*, 528 F.3d 790, 799 (10th Cir. 2008) (§ 1983 claim stated where police officers who "knowingly supplied false information in affidavits" instituted legal process).

The courts below apparently viewed petitioners as the *equivalent* of complaining witnesses. But there is neither factual nor legal support for such a notion; it is simply an attempt to "reframe [the] claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part). Insisting, counterfactually, that petitioners were acting as police officers rather than prosecutors when they initiated the prosecution simply manipulates the function test and imposes liability that *Imbler* would bar.

3. Although *Buckley* observed that "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested," 509 U.S. at 274, that language must be read in the larger context of this Court's immunity jurisprudence. As four Justices observed in that case:

> We were quite clear in *Imbler* that if absolute immunity for prosecutors meant anything, it meant that prosecutors were not subject to suit for malicious prosecution. Yet the central component of a malicious prosecution claim is that the prosecutor in question acted maliciously and *without probable cause*. If the Court means to withhold absolute immunity whenever it is alleged that the injurious actions of a prosecutor occurred before he had probable cause to believe a specified individual committed a crime, then no longer is a claim for malicious prosecution subject to ready dismissal on absolute immunity grounds, at least where the claimant is clever enough to include some actions taken by the

> prosecutor prior to the initiation of prosecution.

509 U.S. at 287 (Kennedy, J., concurring in part and dissenting in part).

This Court has held fast to the principle that a prosecutor may not be sued for malicious prosecution. It affirmed in a unanimous opinion last term that *Imbler* "granted prosecutors absolute immunity from common-law tort actions, say, those underlying a 'decision to initiate a prosecution.'" *Van de Kamp*, 129 S. Ct. at 860 (quoting *Imbler*, 424 U.S. at 421). Justice Ginsburg has observed that a "'malicious prosecution' theory" would be "anomalous" against a prosecutor—who is "[t]he principal player in carrying out a prosecution"—because he would be "exonerated" by absolute immunity. *Albright*, 510 U.S. at 279 n.5 (Ginsburg, J., concurring).

If Harrington and McGhee were wrongfully prosecuted, it was because Hrvol and Richter, functioning as prosecutors, filed criminal charges without probable cause. "[T]he prosecutor's act in seeking an indictment is but the first step in the process of seeking a conviction," and "[e]xposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work." *Malley*, 475 U.S. at 343. For that act, petitioners had absolute immunity. Any attempt to recharacterize it is simply an end run around *Imbler*.

B. Petitioners Also Are Immune From Any Claim Based On Respondents' Arrests.

As with malicious prosecution, the question presented in this case does not encompass respondents' arrests, but any theory under which petitioners could

be liable for the prosecutions and convictions based on arrest without probable cause is similarly insupportable.

The Fourth Amendment prohibits unreasonable search and seizure, but nothing petitioners did resulted in an unreasonable search or seizure. Respondents were not arrested until, as they allege, petitioners approved the filing of the preliminary informations that were signed by a police officer, which resulted in the issuance of arrest warrants under Iowa law. Respondents' decision to approve the charges in the preliminary informations was immunized. See *Kalina*, 522 U.S. at 129. Thus, petitioners' liability for a Fourth Amendment violation would require proof of an immunized charging decision, which makes such liability barred by prosecutorial immunity. *Van de Kamp*, 129 S. Ct. at 862.

In summary, petitioners were absolutely immune for their conduct at trial, and that immunity may not be circumvented by focusing on their decision to initiate the prosecution. That act was absolutely immune as well.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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